IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 18 OF 2003.

Employees State Insurance Corporation,
represented by the Manager,
E.S.I. Corporation
Local Office at Margao,
Near Rajendra Prasad Stadium. .... Appellant/
Complainant.

Versus

1. M/s. Cortalim Shipyard & Engineers,
Pvt. Ltd., Cortalim, Goa.

2. Shri Anil Salgaonkar,
Salgaonkar Chambers,
Margao, Goa. .... Respondents/
Accused.

Mrs. A. A. Agni, Advocate for the Appellant.

Shri D. Pangam, Advocate for the Respondents.

CORAM: N. A. BRITTO, J.

DATE: 13th APRIL, 2005.

ORAL JUDGMENT:

This is a complainant's appeal against the acquittal of the accused.

2. Shri V.S. Khatre who was the Manager of the Employees State Insurance Corporation filed a complaint under Section 85(a) of the

Employees State Insurance Act, 1948 (Act, for short) against accused no.1 which, according to him was an establishment under the Act having been allotted Code No.32-28-67 and against accused No.2 who was Director and occupier of the said establishment named M/s. Cortalim Shipyard and Engineers Pvt. Ltd.

3. The complaint was filed for the failure to pay the contributions for the wage periods of October, 1992 to May, 1993 which were payable in terms of Regulations 31, 39 and 40 of the Employees State Insurance (General) Regulations, 1950.

4. The complaint was filed after the sanction was accorded by the Regional Director of the said Corporation.

5. Although the sanction was obtained to prosecute the principal employer i.e. A.2 and the said establishment M/s Cortalim Shipyard and Engineers Pvt. Ltd. (A.1), charge came to be framed by the learned Trial Court only against A.2 Anil Salgaonkar as Director and occupier of accused No.1 situated at Cortalim, Goa but surprisingly both the accused have been acquitted under Section 85(a) of the Act (wrongly stated as discharged) by the learned Trial Court.

6. Although the complaint was filed by Shri Khatre as the then Manager of the said Corporation, at the time of giving evidence it is one Prakash Mazumdar who was examined and who clearly stated that he was conversant with the facts of the case based on records.

7. This appeal has got to be considered as an appeal against the acquittal of A.2 Shri Anil Salgaonkar in his capacity as Director and occupier of the establishment of A.1, since it is he only who was charged and tried for the said offence and as no charge was framed against A.1-Company.

8. Shri Pangam, the learned Advocate of the respondents/accused has placed reliance on the case of ***C. Antony v. K.G. Raghavan Nair [(2003) 1 S.C.C. 1]*** and has submitted that this being an appeal against acquittal if two reasonable conclusions could be reached on the basis of evidence on record, this Court as a Court of appeal ought not to disturb the finding of the trial Court and that this Court will interfere only in the event the finding of the trial Court is either perverse or contrary to the material on record since this Court cannot substitute its finding merely because another contrary view is possible based on the material on record.

9. There can be no dispute with the above proposition of law as stated by

the Hon'ble Supreme Court in various cases and repeated in the above case.

10. Shri Pangam has submitted that a Company could be prosecuted only under Section 86-A of the Act and its Director/s only in the event it is shown that such Director/s was a person who was in charge of and responsible for the conduct of the day to day business of the said Company. Shri Pangam has submitted that there was no allegation in the complaint filed nor any evidence has been led to show that the respondent/Accused No.2 was responsible and in charge of the conduct of business of the said Company (A.1) at the time of commission of the offence and being so, he could not have been prosecuted nor held guilty by the Court. Shri Pangam has relied upon certain authorities to which I will refer to a little later.

11. On the other hand, Smt. Agni, the learned counsel of the complainant, has submitted that the Company was running a factory i.e. the establishment of A.1, and , A.2 was prosecuted as deemed occupier of the said factory being one of the Directors of the said Company in terms of the definition of principal employer as given in Section 2(17) of the Act r/w the definition of occupier given in Section 2(n) of the Factories Act, 1948.

12. Section 40 of the Act saddles the liability to pay the contributions in the first instance on the principal employer, and, Section 85 provides for punishment for failure to pay contributions on any person who fails to pay the contributions which under the Act he is liable to pay.

13. Sub-section (17) of Section 2 of the Act defines "principal employer" to mean

(i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948, the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the Head of the Department;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment.

14. Section 2(15) of the Act provides that the expression "occupier" will have the same meaning as in the Factories Act, 1948.

15. Section 2(n) of the Factories Act, 1948 defines “occupier” of a factory to mean the person who has ultimate control over the affairs of the factory;

provided that

(i) .....

(ii) in the case of a Company, any one of the Directors shall be deemed to be the occupier;

(iii) .....

16. In the case of ***Mazumdar (T.K.) and others v. E.S.I.C. And another (1989 1 L.L.N. 25)*** it was held that under the scheme of the Act an offence could be committed not by the Company, but by the principal employers and, as such, no question can possibly arise of making an accused vicariously responsible for an offence committed by the company by alleging that he was in charge of the business or in overall control of the day to day business of the company. Under the Act, responsibility was cast upon the principal employer to make deduction from wages of employees and to deposit the same in the Employees' State Insurance Fund within a certain period and if it is not done, he should be deemed to have committed the offence of criminal breach of trust as laid down in explanation 2 to S.405 of the Indian Penal Code. It was further held that

it was the responsibility of the principal employer to make deduction from the wages of employees and that the sensible view would be that the expression “employer” as used in this explanation meant the 'principal employer' since any other interpretation would render the explanation nugatory. It was further held that the Managing director, directors and managers were the “principal employers”, being occupiers of the factory and were liable to be prosecuted for the offence of criminal breach of trust under explanation 2 to S. 405 of I.P.C. for their failure to deposit the amount deducted by them as principal employers from the wages of the employees.

17. That was an authority for the purpose of Section 405 I.P.C. and before Section 86A was inserted in the Act on 20.10.89.

18. In the case of ***Employees State Insurance Corporation, Chandigarh v. Gurdial Singh and others (1991 Lab.I.C.m52)*** the Full Bench of the Hon'ble Supreme Court referred to the definition of “principal employer” under sub-section (17) of S.2 of the Act and on facts found that the Company had a factory and it was not disputed that the occupier of the factory was named and that it also had a manager and therefore came to the conclusion that the directors did not come within clause (i) of sub-section (17) of S.2 of the Act and since the occupier was there, clause (i)

applied.

19. In ***Siddharth Kejriwal v. Regional Director, ESI Corporation (1995 1 CLR 517)*** it has been held that when an offence is by the company, to make a director liable, the averments in the complaint or documents produced along with the complaint must prima facie indicate that such director was in charge of and responsible for the conduct of business of the company. If there is nothing on record to prima facie indicate that a director was in charge of and responsible for conduct of the business of the company, then it amounts to non-disclosure of any offence against such director and process cannot be issued against him for the offence committed by the company, only on the ground that he is a director of the company.

20. This case dealt with quashing of prosecution against A.2 to A.8 for want of necessary allegations that they were in charge of and responsible for the conduct of business of the Company. All of them were prosecuted as principal employers of A.1-Company.

21. In the case of ***J.K. Industries Ltd. v. The Chief Inspector of Factories and Boilers (1996 (74)FLR 2608)*** the Supreme Court stated that there is a vast difference between a person having ultimate control of

the affairs of a factory and one who has immediate or day to day control over the affairs of the factory and in case of a Company, the ultimate control of the factory, where the company is the owner of the factory, always vests with the Company, through its Board of Directors. The manager or any other employee of whatever status can be nominated by the Board of Directors. The Manager or any other employee, of whatever status, can be nominated by the Board of Directors of the owner company to have immediate or day to day or even supervisory control over the affairs of the factory. Even where the resolution of the Board of Directors says that an officer or employee, other than one of the directors, shall have the 'ultimate' control over the affairs of the factory, it would only be a camouflage or an artful circumvention because the ultimate control cannot be transferred from that of the company, to one of its employees or officers, except where there is complete transfer of the control of the affairs of the factory. Mechanical recitation of the words of Section 2(n), as a mantra, in a resolution nominating an employee or an officer as the occupier by stating that he shall have “ultimate control over the affairs of the factory”, cannot be permitted to defeat the object of the amendment. The provisions of the Act have to be construed in a manner which would promote its object, prevent its subtle evasion and foil its artful circumvention to suppress the mischief. The Hon'ble Supreme Court further stated that even after the 1987 amendment, the true import of

proviso (ii) to Section 2(n) would be that in the case of a company, which owns the factory, the company cannot nominate any one of its employees or officers, except a director of the company, as the occupier of the factory. In other words, an occupier of the factory in the case of a company must necessarily be any of its directors who shall be so notified for the purposes of the Factories Act. Such an occupier cannot be any other employee of the company or the factory. The Supreme Court further held that by the Amending Act of 1987 the legislature wanted to bring in a sense of responsibility in the minds of those who have the ultimate control over the affairs of the factory, so that they take proper care for maintenance of the factories and the safety measures therein. The fear of penalty and punishment is bound to make the Board of Directors of the company more vigilant and responsive to the need to carry out various obligations and duties under the Act, particularly in regard to the safety and welfare of the workers. Proviso (ii) was introduced by the Amending Act, couched in a mandatory form – 'any one of the directors shall be deemed to be the occupier' – keeping in view the experience gained over the years as to how the directors of a company managed to escape their liability, for various breaches and defaults committed in the Factory by putting up another employee as a shield and nominating him as the 'occupier who would willingly suffer penalty and punishment. The state of unemployment in the country being what it is,

it is not difficult to “hire” the services of someone only for this job. Proviso (ii) now makes it possible to reach out to a director of the company itself, who shall be prosecuted and punished for breach of the provisions of the Act, apart from prosecution and punishment of the Manager and of the actual offender. The proviso, by making one of the directors of the company responsible for proper implementation of the provisions of the Act, to a great extent ensures that more care is taken for the maintenance of the factory and various safety measures prescribed under the Act for the health, welfare and safety of the workers are not neglected. In the case of a company, the main part of Section 2(n) would not be workable unless that provision is read alongwith proviso (ii). The definition of an occupier under Section 2(n) is of general application and different situations have been covered by the legislature only in different provisos appended to Section 2(n). The expression “shall be deemed to be an occupier” in second proviso to Section 2(n) indicates the creation of a legal fiction but it is wrong to presume that such legal fiction can come into play only where the substantive provisions of Section 2(n) is not attracted. As already observed, the substantive provision of Section 2(n) can become workable only in the case of a company, when the same is read alongwith proviso (ii). The deeming provision does not override the substantive provision of Section 2(n) but clarifies it. The Supreme Court concluded by observing that there is nothing unreasonable in fixing the

liability on a director of a company and making him responsible for compliance with the provisions of the Act and the rules made thereunder and laying down that if there is contravention of any of the provisions of the Act or an offence is committed under the Act, the notified director, and in the absence of the notification, any one of the directors of the company, shall be prosecuted and shall be liable to be punished as the deemed occupier.

22. The case at hand is not a case where the respondent No.2/accused was prosecuted as a person who, at the time the offence was committed, was in charge of and/or responsible to the company for the conduct of the business of the company. Respondent No.2/accused was prosecuted as can be seen from the complaint as well as the charge framed by the learned J.M.F.C. as director and occupier of the establishment of A.1. In my view Respondent No.2/accused could have been prosecuted as a director and occupier of the establishment of A.1 if the complainant could show that the establishment of A.1 was indeed a factory to which the provisions of the Factories Act, 1948 were applicable. In my view Respondent No.2/accused with the aid of the deeming provision of clause (ii) of Section 2(n) of the Factories Act, 1948 r/w S.2(17)(i) of the Act could have been prosecuted for non-compliance of Section 85(a) of the Act. In my view the case of Siddarth Kejriwal (supra) is distinguishable in

that the learned Judge did not place required stress on the deeming provision of sub-clause (ii) of clause (n) of Section 2 of the Factories Act, 1948. It would be immaterial if such a director was a sleeping director, assuming that there were such directors, or not.

23. However, the next question is whether the complainant has at all proved that Respondent No.2/accused was a director and, as such, an occupier of the said factory/establishment of A-1.

24. As already stated, the complainant who filed the complaint was not examined, but in his place another Manager by name Mazumdar/P.W.1 was examined, and, at the very outset P.W.1 Mazumdar had stated that he was conversant with the facts of the case based only on records. There was not a positive statement made to say that the establishment of A.1 was a factory. Inspite of stating that his knowledge was based on records P.W.1 Mazumdar made a statement that A.2 looks after and manages the day to day affairs of A.1 without stating as to how he came to know about the said fact. It was rightly observed by the learned J.M.F.C. that there was no whisper in the evidence of P.W.1 Mazumdar in what capacity A.2 was looking after or managing the day to day affairs of A.1 and that such a statement was forthcoming for the first time in his evidence before the Court without there being any such statement in that

regard in the complaint. It is common knowledge that Regulation 10B of the 1950 Regulations provides for registration of factories or establishments and it further provides that the employer in respect of a factory or an establishment to which the Act applies for the first time and to which an Employer's Code Number is not yet allotted and the employer in respect of a factory or an establishment to which the Act previously applied but has ceased to apply for the time being, shall furnish to the appropriate Regional Office not later than 15 days after the Act becomes applicable, as the case may be, to the factory or establishment, a declaration or registration in writing in Form 01. As per the complainant the establishment of A.1 was given a code number and it certainly could be presumed the establishment of A.1 had furnished Form 01/employer's registration form which certainly would have given all the details about the said establishment. The complainant chose not to produce the said registration form which could have certainly thrown light as to what was the relationship of A.2 vis-a-vis the said establishment. In my view this was a fit case to draw adverse inference against the complainant for non-production of Form O1. The learned J.M.F.C. was right in observing that it was not open to the complainant to implicate any one of his choice at his whims or fancy and that the object underlining the furnishing of the registration form was to pin-point the person/s who could be held responsible for the management of the establishment or for that matter

for the person who could be liable for non-performance of the duties imposed by the Act. Apart from the fact that the complainant did not produce any document to show that A.2 was either the director or occupier of A.1, the documents produced by the complainant created grave suspicion regarding the complainant's case as stated in the complaint. For example, Exh.48 - a copy of the ledger which the complainant produced, shows that the name of the establishment is V.M. Salgaonkar & Bro. Pvt. Ltd. Likewise the notice dated 10.6.92 shows that it was sent to M/s. V.M. Salgaonkar and Bro. Ltd. demanding interest and damages. The complainant failed to prove by cogent and reliable evidence that A.2 was the director or occupier of the said A.1 or V.M. Salgaonkar & Bro. Pvt. Ltd. In fact, it was suggested to the complainant that at the time of giving Code number, A.1 was under the control of M/s. V.M. Salgaonkar and Co. to which the complainant could give no answer. To another suggestion that the Head Office of A.1 was at Cortalim and not at Margao, the complainant stated that he did not know anything about the same. As stated by P.W.1 Mazumdar himself and as his evidence otherwise also shows, the complainant was not aware of anything about the facts of the case except that he deposed in support of the complaint which was previously filed by Shri Khatre the then Manager of the complainant.

25. In fact, the complainant conceded that he did not have any document to show that respondent No.2 was the owner and occupier of A-1/company. Being so and in my view considering the evidence led by the complainant, the learned J.M.F.C. was justified in acquitting the respondent No.2/accused.

26. In view of the above, there is absolutely no merit in this appeal and consequently the same is hereby dismissed with costs which shall be credited to the State Legal Services Authority, Panaji. The approach in conducting the prosecution and then filing an appeal against acquittal has been most casual. The Corporation will be at liberty to recover the costs from those officers who are responsible for failure of the said prosecution.

N. A. BRITTO, J.

sl.